United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 18-0779**
	)	**Issued: December 12, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Edison, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 2, 2018 appellant, through counsel, filed a timely appeal from an October 16, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish greater than 15 percent permanent impairment of the right upper extremity, for which he previously received

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

schedule award compensation; and (2) whether he has met his burden of proof to establish permanent impairment of his left upper extremity warranting a schedule award.

FACTUAL HISTORY

On August 24, 1990 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging injury to his neck, left arm, and shoulder that day when he slipped and fell. OWCP initially accepted the claim for neck strain and left shoulder strain. The acceptance of the claim was later expanded to include cervical disc displacement. Appellant underwent cervical surgery shortly after the August 24, 1990 work incident and later returned to work. He stopped work on March 29, 2010. Appellant retired from the employing establishment effective September 4, 2012.

On August 21, 2013 appellant filed a claim for a schedule award (Form CA-7).

In a January 14, 2013 report, Dr. Arthur Becan, an orthopedic surgeon, noted appellant's history of injury, reviewed the medical evidence, and related examination findings. He found that appellant had reached maximum medical improvement (MMI) from his work-related injuries on January 14, 2013. Dr. Becan calculated 19 percent right upper extremity permanent impairment and 17 percent left upper extremity permanent impairment based upon the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] He explained that the right upper extremity permanent impairment was comprised of a class 1 mild sensory deficit right (C6) nerve root, yielding a net adjusted permanent impairment of two percent; a class 1 mild motor strength deficit of the right deltoid (C6) yielding a net adjusted permanent impairment of nine percent; and class 1 mild motor strength deficit of the right triceps (C7), yielding a net adjusted permanent impairment of nine percent. The left upper extremity impairment was comprised of class 1 mild motor strength deficits in left deltoid (C6) yielding a net adjusted permanent impairment of nine percent; and class 1 left triceps (C7) motor strength deficit yielding a net adjusted permanent impairment of nine percent. Dr. Becan noted that his impairment calculations were made in accordance with the A.M.A., *Guide*s and Table 1 of *The Guides Newsletter*.[4]

In a September 6, 2013 report, an OWCP district medical adviser (DMA) reviewed Dr. Becan's January 14, 2013 report.[5] The DMA indicated that appellant had reached MMI on the date of Dr. Becan's report on January 14, 2013. The DMA recommended that an electrodiagnostic study be performed to determine if radiculopathy was present in the upper extremities. OWCP forwarded a copy of the DMA's report to Dr. Becan, who agreed with the DMA's recommendation. No further evidence was received.

By decision dated January 29, 2014, OWCP denied the schedule award claim as there was a lack of evidence to support permanent impairment of a scheduled member.

[3] A.M.A., *Guides* (6th ed. 2009).

[4] *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009).

[5] The DMA's signature is illegible.

On February 3, 2014 appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on June 12, 2014.

On May 29, 2014 OWCP received a January 29, 2014 EMG/NCV study of the bilateral upper extremities. The electrical findings were consistent with a right C5 and C6 radiculopathy.

By decision dated July 10, 2014, an OWCP hearing representative vacated OWCP's January 29, 2014 decision and remanded the case to OWCP for consideration of the January 29, 2014 EMG/NCV study.

On July 25, 2014 Dr. James W. Dyer, a Board-certified orthopedic surgeon, acting as an DMA for OWCP, found that the January 29, 2014 EMG/NCV study was consistent with right-sided C5 and C6 radiculopathy. Under the A.M.A., *Guides*, he calculated 15 percent permanent impairment of the right upper extremity for the right C6 and C7 nerve root radiculopathy. Dr. Dyer explained that the C6 class 1 mild sensory deficit equaled two percent permanent impairment after net adjustment; the class 1 moderate motor deficit equaled a nine percent permanent impairment after net adjustment; and a class 1 mild motor deficit for C7 equaled five percent permanent impairment. No impairment was found for the left upper extremity.

By decision dated October 31, 2014, OWCP awarded appellant a schedule award for 15 percent permanent impairment of the right upper extremity.

On November 10, 2014 counsel requested an oral hearing before an OWCP hearing representative. On January 27, 2015 following a preliminary review, an OWCP hearing representative set aside OWCP's October 31, 2014 decision finding that Dr. Dyer failed to provide medical rationale for the zero percent impairment rating of the left upper extremity. The case was remanded to OWCP to secure an addendum report from Dr. Dyer.

In a February 11, 2015 report, Dr. Dyer opined that Dr. Becan had used subjective empirical criteria, not objective criteria for the left upper extremity permanent impairment rating. He explained that true objective weakness would be evidenced by atrophy of the mentioned muscles, which was absent on examination. Additionally, the weakness described by Dr. Becan and normal findings on January 29, 2014 EMG/NCV study of left upper extremity confirmed zero percent permanent impairment of the left upper extremity.

By decision dated April 21, 2015, OWCP awarded appellant a schedule award for 15 percent permanent impairment of the right upper extremity however, found no impairment for the left upper extremity. The award ran for 46.8 weeks for the period January 14 to December 7, 2013 and 0.6, fraction of a day.

On April 30, 2015 counsel requested an oral hearing before an OWCP hearing representative, which was held on July 8, 2015. On July 9, 2015 OWCP received Dr. Becan's June 16, 2014 statement indicating that he had reviewed the January 28, 2014 EMG/NCV studies. Dr. Becan stated that the EMG/NCV study correlated with his physical examination findings in his report of January 14, 2013 and did not change his impairment rating.

By decision dated September 1, 2015, an OWCP hearing representative set aside OWCP's April 21, 2015 decision and found a conflict in medical opinion existed between Dr. Becan and

Dr. Dyer, the DMA, regarding whether appellant sustained greater than 15 percent permanent impairment of the right upper extremity and 0 percent of the left upper extremity due to the accepted employment injury. The case was remanded to OWCP for referral to an impartial medical specialist.

In a September 9, 2015 letter, counsel requested to participate in the selection of the impartial medical specialist. He also requested that OWCP provide all documentation pertaining to the selection of the impartial medical specialist. By decision dated October 7, 2015, OWCP denied appellant's request to participate in the selection of the impartial medical specialist, finding that there was no indication of bias, unprofessional conduct or other valid reason for participation.

On October 19, 2015 OWCP selected Dr. Diana D. Carr, a Board-certified orthopedic surgeon, as an impartial medical examiner (IME). In a November 18, 2015 report, Dr. Carr noted appellant's history of injury, reviewed appellant's medical records and a September 10, 2015 statement of accepted facts (SOAFs). She thereafter presented her examination findings. Dr. Carr opined that appellant had 12 percent whole person permanent impairment based on cervical spine changes. In a January 14, 2016 report, she determined that he had 12 percent whole person impairment due to problems with his right arm and neck based on Chapter 17 of the sixth edition of the A.M.A., *Guides*. Dr. Carr indicated that there was no rating for the left upper extremity.

On February 9, 2016 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as the DMA, reviewed the medical record, including Dr. Carr's reports. He opined that appellant had no permanent impairment to either upper extremity as there was no evidence of neurologic deficit in either extremity. Dr. Harris also noted that Dr. Carr had offered a rating based on impairment of the spine rather than involvement of the upper extremities. On February 23, 2016 OWCP sought clarification from Dr. Harris. In a March 1, 2016 report, Dr. Harris advised that Dr. Carr did not use *The Guides Newsletter* in calculating permanent impairment for spinal nerve impairment.

On March 14, 2016 OWCP requested that Dr. Carr address the deficiencies identified by the DMA. In a March 24, 2016 report, Dr. Carr indicated that her 12 percent permanent impairment rating was done in accordance to the A.M.A., *Guides* and *The Guides Newsletter*. She referred to her prior evaluation of November 23, 2015.

In an April 28, 2016 report, DMA Dr. Harris reviewed the medical evidence of record and advised that Dr. Carr had continued to use Table 17-2, rather than the appropriate newsletter in her impairment rating. Based on Dr. Carr's November 18, 2015 examination, he opined that appellant had zero percent permanent impairment of either upper extremity. Dr. Harris indicated that Dr. Carr's evaluation did not document a neurologic deficit in either upper extremity based on objective neurologic findings. He explained that, while the January 29, 2014 EMG/NCV study demonstrated some nonspecific changes, including fibrillation in the C5 and C6 distribution, this did not constitute objective evidence of cervical radiculopathy without objective neurologic findings. Dr. Harris noted that the date of MMI was November 18, 2015.

On May 19, 2016 OWCP updated the SOAF and scheduled another impartial medical evaluation to resolve the continuing conflict in medical opinion between Dr. Becan and the DMA regarding the nature and extent of appellant's permanent impairment, if any.

On June 6 and 8, 2016 a medical scheduler called the office of Dr. Howard Kapp, a Board-certified orthopedic surgeon, to arrange for an impartial medical evaluation. The June 21, 2016 iFECS ME023 -- Appointment Schedule Notification report noted that Dr. Kapp's office returned the call on June 9, 2016 and indicated that appellant could be seen by Dr. Kapp on July 18, 2016. The iFECS ME023 report further indicated that on June 21, 2016 between 1:40 p.m. and 1:57 p.m. 10 physicians were bypassed with bypassed (Code O -- other) as an IME appointment had been made with Dr. Kapp for July 18, 2016 at 1:00 p.m.

In a July 18, 2016 report, Dr. Kapp reviewed the medical records, including the SOAF, and noted examination findings. He indicated that appellant's cervical spine examination range of motion was limited to 50 percent in all directions without radicular findings or focal neurologic deficits. Right and left shoulder examinations revealed normal motion and stability and no localized tenderness. Dr. Kapp opined that appellant had 12 percent whole body impairment related to surgically-treated cervical disc herniation with residuals and loss of range of motion of the cervical spine.

In an August 1, 2016 addendum, Dr. Kapp indicated that appellant had a whole body impairment rating related to his cervical spine and that an upper extremity impairment rating did not apply, as appellant's permanent impairment was related to his cervical spine.

On August 17, 2016 OWCP advised Dr. Kapp of the use of *The Guides Newsletter* for rating upper extremity impairments and requested an updated report. A copy of *The Guides Newsletter* was also provided to Dr. Kapp. In an October 3, 2016 addendum, Dr. Kapp reviewed the A.M.A., *Guides* and *The Guides Newsletter* and opined that under Table 17-2 appellant had a class 2 or 11 percent whole body impairment.

On October 27, 2016 Dr. Morley Slutsky, a Board-certified occupational medicine specialist serving as the DMA, indicated that Dr. Kapp did not offer an impairment under *The Guides Newsletter*. He noted that the file lacked the requisite citations from the A.M.A., *Guides* or evidence of application of *The Guides Newsletter* to establish a schedule award. Dr. Slutsky provided explicit instructions of how to properly rate an upper extremity with cervical nerve root deficits.

On November 7, 2016 and January 3, 2017 OWCP provided a copy of Dr. Slutsky's October 27, 2016 report with instructions on how to properly rate an upper extremity impairment with cervical nerve root deficits to Dr. Kapp and requested a new addendum report.

In an April 12, 2017 report, Dr. Kapp noted that appellant had no neurologic injury and no upper extremity permanent impairment. He noted, however, that appellant did have a permanent impairment of the cervical spine.

By decision dated May 3, 2017, OWCP denied additional entitlement to the upper extremity beyond that previously paid. Special weight was accorded to Dr. Kapp as the impartial medical specialist.

On May 11, 2017 appellant, through counsel, requested a hearing before an OWCP hearing representative, which was held on August 16, 2017. Counsel presented arguments regarding the

selection of Dr. Kapp as the IME and asserted there were insufficiencies in Dr. Kapp's medical reports.

By decision dated October 16, 2017, an OWCP hearing representative affirmed OWCP's May 3, 2017 decision. The hearing representative found that Dr. Kapp was properly selected as the impartial medical specialist and that the selection process was properly documented. The hearing representative further found that Dr. Kapp's April 12, 2017 opinion that there was no neurologic injury documented in the upper extremities and, thus no impairment, was reasoned and consistent with the evidence of record.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of scheduled members or functions of the body.[6] However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[9] A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under FECA.[10] Moreover, neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.[11]

In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be

[6] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[7] *K.H.*, Docket No. 09-0341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] *Pamela J. Darling*, 49 ECAB 286 (1998).

[10] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[11] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[12]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/ August 2009) is to be applied.[13]

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[14] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[15] Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[16]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[17]

ANALYSIS

The Board finds that this case is not in posture for decision.

The Board notes that OWCP properly identified a conflict in medical opinion between Dr. Becan, appellant's treating physician, and Dr. Dyer, acting as the DMA for OWCP, regarding whether appellant sustained greater than 15 percent permanent impairment of the right upper extremity and a permanent partial impairment of left upper extremity due to the accepted work injuries. This conflict required referral to an IME pursuant to 5 U.S.C. § 8123.

OWCP initially referred appellant to Dr. Carr. The Board finds that Dr. Carr's reports of November 18, 2015 and January 14 and March 24, 2016, in which she opined that appellant had 12 percent whole person permanent impairment, are of insufficient probative value to resolve the

[12] *See R.V.*, Docket No. 16-1037 (issued November 14, 2016).

[13] *See G.N.*, Docket No. 10-0850 (issued November 12, 2010); *see also supra* note 7 at Chapter 3.700, Exhibit 1, (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[14] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[15] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[16] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[17] *See supra* note 7 at Chapter 2.808.6(f) (March 2017).

conflict in medical opinion evidence.[18] Dr. Carr's opinion is of diminished probative value as she provided a whole person permanent impairment rating, which is not permitted under FECA.[19] As Dr. Carr's reports did not represent the weight of the medical evidence with regard to appellant's bilateral upper extremity impairment, OWCP properly referred appellant to a new impartial medical specialist, Dr. Kapp, for examination and an opinion on the matter.[20]

The Board finds, however, that Dr. Kapp's IME reports do not represent the special weight of the medical evidence.[21] Dr. Kapp's reports failed to utilize the proper standard of the A.M.A., *Guides* and *The Guides Newsletter*.[22] In his July 18, 2016 report, he opined that appellant had 12 percent whole body impairment related to a surgically treated cervical disc herniation with residuals and loss of range of motion of the cervical spine. In an August 1, 2016 addendum, Dr. Kapp indicated that appellant had a whole body impairment rating related to his cervical spine and that an upper extremity impairment did not apply. In his October 3, 2016 addendum, he opined that under Table 17-2 appellant had a class 2 or 11 percent whole body impairment. As previously noted, FECA does not authorize schedule awards for whole body impairment.[23] As such all of Dr. Kapp's reports do not contain an opinion consistent with the sixth edition methodology rating appellant's upper extremity impairment and are of limited probative value.

In his April 12, 2017 addendum, Dr. Kapp noted that appellant had no neurologic injury and no upper extremity permanent impairment. He noted, however, that appellant did have permanent impairment of the cervical spine. However, neither FECA nor its implementing regulations provide for a schedule award for impairment to the spine. Furthermore, the back is specifically excluded from the definition of organ under FECA.[24]

When an impartial medical examiner fails to provide medical reasoning to support his or her conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the

[18] *D.B.*, Docket No. 17-1845 (issued February 16, 2018).

[19] *A.L.*, Docket No. 08-1730 (issued March 16, 2009); *Marilyn S. Freeland*, 57 ECAB 607 (2006).

[20] *Harold Travis*, 30 ECAB 1071 (1979) (after unsuccessful clarification by an impartial medical specialist, the case must be referred to a new impartial medical specialist).

[21] Counsel has objected to the selection of Dr. Kapp as the IME. In this case, OWCP's medical scheduler had contacted Dr. Kapp's office on June 6 and 8, 2016 to arrange an impartial examination. It received a return call on June 9, 2016 from Dr. Kapps's office indicating that appellant could be seen on July 18, 2016. While it is unclear why OWCP continued to contact various physicians on June 21, 2016 after it had already appropriately scheduled an appointment with Dr. Kapp, there is no evidence presented that establishes that the selection of Dr. Kapp was itself improper. There was no violation of established procedures. Code O is used for situations such as when there is no current telephone listing, the physician's telephone had been disconnected, or no one answers the telephone. Once the selection of Dr. Kapp was properly made, the additional attempts to schedule and thus bypass physicians constitutes harmless error.

[22] *See D.W.*, Docket No. 16-1144 (issued March 1, 2017).

[23] *See supra* note 10.

[24] *Supra* note 11.

medical evidence.[25] Board precedent and OWCP procedures provide that if a report of an impartial medical examiner is vague, speculative, incomplete, or unrationalized, it is the responsibility of OWCP to secure a supplemental report to correct any defect. If the impartial specialist is unable or unwilling to provide a supplemental report or if the supplemental report is also defective, OWCP should arrange for another impartial medical examination.[26] Because Dr. Kapp's April 12, 2017 report is insufficient to resolve the conflict in the medical opinion evidence, OWCP should have referred appellant for another impartial medical evaluation.[27]

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: December 12, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

[25] *James T. Johnson*, 39 ECAB 1252, 1256 (1988).

[26] *See Raymond A. Fondots*, 53 ECAB 637 (2002); and *Harold Travis*, 30 ECAB 1071 (1979); *see also supra* note 7 at Chapter 2.810.11(c)(2) (September 2010).

[27] The Board notes that OWCP failed to follow its procedures and route the case to its medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with respect to the April 12, 2017 addendum. *See Gary R. Sieber*, 46 ECAB 215, 225 (1994).